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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation;
ORACLE AMERICA, INC. a Delaware
corporation; and ORACLE INTERNATIONAL
CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation;
SETH RAVIN, an individual,

Defendants.

Case No. 2:10-cv-00106-LRH-PAL

**[PROPOSED] ORDER GRANTING
PLAINTIFFS ORACLE USA, INC.,
ORACLE AMERICA, INC., AND
ORACLE INTERNATIONAL
CORPORATION'S MOTION FOR
EVIDENTIARY SANCTIONS FOR
SPOILIATION**

REDACTED

[PROPOSED] ORDER

Pending before this Court is Plaintiffs Oracle USA, Inc., Oracle America, Inc., and Oracle International Corporation's (collectively "Oracle") Motion for Evidentiary Sanctions for Spoliation against Defendants Rimini Street, Inc. and Seth Ravin (together, "Rimini") [Docket No. ____]. After full consideration of the moving and opposing papers of each party, the arguments of counsel, and all other matters presented to the Court, the motion is GRANTED.

In January 2010, [REDACTED] the contents of a Rimini network location known as the "software library." The evidence shows that Rimini employees copied into the software library a wide array of PeopleSoft software and support materials, and later copied those same materials from the library to create installed copies of PeopleSoft software, referred to as "environments." The software library was not segregated in customer-specific "data silos" but was instead organized by product and version. [REDACTED]

The Court has inherent authority to impose sanctions for spoliation, including for the destruction of evidence relevant to reasonably foreseeable litigation. *In re Nat'l Consumer Mortg., LLC*, 2:10-CV-00930-PMP, 2011 WL 1300540, at *8 (D. Nev. Mar. 31, 2011) (citing *United States v. Kitsap Physicians Svs.*, 314 F.3d 995, 1001 (9th Cir. 2002)). The duty to preserve evidence "extends to the period before litigation when a party should reasonably know that evidence may be relevant to anticipated litigation." *Morford v. Wal-Mart Stores, Inc.*, 2:09-CV-02251-RLH, 2011 WL 635220, at *3 (D. Nev. Feb. 11, 2011) (citing *In re Napster*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006)).

Here, Rimini should have anticipated and did anticipate this litigation prior to the January 2010 deletion of the software library. In December 2008 and January 2009, counsel for Oracle sent letters to Rimini warning of claims of copyright infringement, including through the maintenance of a centralized "library" of Oracle software used to support multiple customers, and in a September 2009 filing in this Court, Rimini acknowledged that these letters were threats

1 of litigation. Moreover, in that filing, Rimini argued that Oracle was preparing litigation against
 2 Rimini. [REDACTED]

3 [REDACTED] These facts demonstrate that Rimini should have, and did,
 4 anticipate this litigation, and thus it was under a duty to preserve evidence. *See Surowiec v.*
 5 *Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1005-06 (D. Ariz. 2011) (written threat of
 6 litigation triggered duty in advance of lawsuit); *Goodman v. Praxair Services, Inc.*, 632 F. Supp.
 7 2d 494, 511 (D. Md. 2009) (where a “letter openly threatens litigation, then the recipient is on
 8 notice that litigation is reasonably foreseeable and the duty to preserve evidence relevant to that
 9 dispute is triggered”); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)
 10 (defendants’ recognition of possible suit triggered duty in advance of litigation); *In re Napster*,
 11 462 F. Supp. 2d at 1068-69 (evidence, including actions to prepare for litigation, showed duty to
 12 preserve in advance of lawsuit); *see also Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1325
 13 (Fed. Cir. 2011). Accordingly, the January 2010 deletion of the software library was spoliation
 14 in violation of Rimini’s duty to preserve evidence.

15 To determine which sanctions are appropriate for Rimini’s spoliation, courts consider (1)
 16 the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice
 17 suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid
 18 substantial unfairness to the opposing party. *See, e.g., Cont’l Cas. Co. v. St. Paul Surplus Lines*
 19 *Ins. Co.*, 265 F.R.D. 510, 533 (E.D. Cal. 2010).

20 First, Rimini is at fault. Its deletion of the library was “willful” because Rimini
 21 undertook an affirmative act after Rimini had “some notice that the documents were *potentially*
 22 relevant to the litigation.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (citation
 23 omitted; emphasis in original). That is a more than adequate basis for an award of evidentiary
 24 sanctions. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993)

25 Second, the deletion prejudiced Oracle. Oracle contends that Rimini’s creation and use
 26 of the software library supports its claim for copyright infringement and rebuts Rimini’s license
 27 defense because, Oracle asserts, the customer licenses on which Rimini depends do not authorize
 28 use of software from one customer to support a different customer. Indeed, Rimini specifically

pled in this case that it maintained clients’ Oracle software and support materials in customer-specific “data silos”, that its clients’ Oracle software and support materials were not “physically co-mingled together,” and that a centralized “library” of Oracle software and support material “never existed at Rimini Street.” (Dkt. 153 at 2-3.)

Furthermore, in discovery, Oracle propounded a number of interrogatories directed at these issues, including the contents of the software library and how it was copied, and moved to compel responses to certain of the interrogatories. Rimini claimed to be unable to respond completely due to lack of available information, including (1) the contents of the software library and (2) which of Rimini’s local installed copies of PeopleSoft software, i.e., environments, were built using the software library. [REDACTED]

[REDACTED] As a result, on these key points, Oracle will have to “rely on incomplete and spotty evidence at trial,” which supports an adverse inference sanction. *Leon*, 464 F.3d at 959 (quoting *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)).

Third, the sanction Oracle seeks – an adverse inference instruction – is the appropriate remedy in these circumstances. *See, e.g., Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991); *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc.*, 803 F. Supp. 2d 469, 487 (E.D. Va. 2011); *Advantacare Healthcare Partners LP v. Access IV*, No. 03-04496, 2004 WL 1837997, at *7-*8 (N.D. Cal. Aug. 17, 2004). Mere payment of fees and expenses would leave Rimini with the advantage in this litigation created by its willful deletion of relevant evidence. And even if the sanction were to put Oracle in a “more advantageous position than if [Rimini] had never destroyed evidence to begin with, the inference is nevertheless appropriate, as it places the risk of an erroneous judgment on the party that wrongfully created the risk.” *Io Group Inc. v. GLBT Ltd.*, C-10-1282 MMC DMR, 2011 WL 4974337, at *8 (N.D. Cal. Oct. 19, 2011) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)).

Accordingly, IT IS HEREBY ORDERED THAT, an adverse inference sanction is appropriate. For summary judgment purposes, Rimini’s January 2010 deletion of the software

library shall be deemed evidence that supports Oracle's claims and does not support Rimini's defenses, and each of the two sets of facts listed below shall be presumed to be true, subject to rebuttal by Rimini. In addition, at any trial, the jury shall be instructed that it may infer from Rimini's January 2010 deletion of the software library that the contents of the software library would have supported Oracle's claims and would not have supported Rimini's defenses. Moreover, the jury shall be instructed to presume the following two sets of facts to be true, subject to rebuttal by Rimini.

1. The software library included a complete copy of each of Oracle's registered works corresponding to the names of the folders at the time of the deletion, including each of the following:

Deleted Folder Name (Ex. 50 (RSI06276320))	Corresponding Registered Oracle Work (Complaint ¶ 75)
CRM 8.8	PeopleSoft Customer Relationship Management Version 8.8
CRM 8.9	PeopleSoft Customer Relationship Management Version 8.9
EPM 8.8	PeopleSoft Electronic Performance Management Version 8.8
EPM 8.9	PeopleSoft Electronic Performance Management Version 8.9
FSCM 8.4 SP2	PeopleSoft Financials and Supply Chain Management Version 8.4 Service Pack 2
FSCM 8.8 SP1	PeopleSoft Financials and Supply Chain Management Version 8.8 Service Pack 1
FSCM 9	PeopleSoft Financials and Supply Chain Management Version 9
HRMS 8 SP1	PeopleSoft Human Resources Management System Version 8 Service Pack 1
HRMS 8.3 SP1	PeopleSoft Human Resources Management System Version 8.3 Service Pack 1
HRMS 8.8 SP1	PeopleSoft Human Resources Management System Version 8.8 Service Pack 1
HRMS 8.9	PeopleSoft Human Resources Management System Version 8.9
HRMS 9.0	PeopleSoft Human Resources Management System Version 9.0
PeopleBooks	Each of the separately registered versions of PeopleBooks alleged in this action

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Category	Sub-category	Item	Value	Unit
Agriculture	Crops	Wheat	1200	kg
		Rice	800	kg
		Corn	500	kg
		Soybeans	300	kg
	Livestock	Cattle	200	kg
		Pigs	150	kg
		Sheep	100	kg
		Poultry	500	kg
	Forestry	Timber	1500	m³
		Firewood	1000	m³
		Medicinal herbs	500	kg
		Wild fruits	300	kg
		Edible mushrooms	200	kg
		Decorative plants	100	kg
		Herbs	50	kg
		Seeds	20	kg
Fishing	Salmon	100	kg	
	Trout	80	kg	
	Perch	60	kg	
	Carp	40	kg	

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IT IS SO ORDERED.

DATED: _____

By: _____
United States District Judge